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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AUGUSTINE ZAMORA, Defendant and Appellant.	B162787 (Los Angeles County Super. Ct. Nos. NA046643 and NA049048)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Lord, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Jonathan J. Kline, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Augustine Zamora (Zamora) was convicted by jury of first degree murder with the personal and intentional discharge of a firearm causing death (Pen. Code,[1] §§ 187, subd. (a); 12022.53, subd. (d)) and four second degree robberies (§ 211). Sentenced to life imprisonment without the possibility of parole, a consecutive indeterminate term of 25 years to life in prison, and a determinate sentence of 9 years, Zamora challenges his conviction and sentence on the following grounds: (1) the sufficiency of the evidence to support the element of proximate cause with respect to the murder conviction; (2) the admission of the victim's statements after the shooting as excited utterances or a dying declaration; (3) the validity of the sentence enhancement under section 12022.53, subdivision (d) in light of the merger doctrine and section 654, subdivision (a); and (4) the trial court's alleged failure to exercise its discretion to consider imposing a sentence less than life in prison without the possibility of parole. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against Zamora arose from two separate incidents in the year 2000. On July 21, 2000, Zamora and another man approached Luis Galaviz (Galaviz) and Jose Sanchez (Sanchez) as they sat in Galaviz's car outside the La Guadalupina market in Long Beach. Zamora held a gun to Sanchez's head and demanded money. When Sanchez denied having money, Zamora became angry and struck Sanchez with the gun. Sanchez handed Zamora money. Zamora then demanded money from Galaviz, who had no money but handed his jewelry to Zamora's companion. Zamora returned to Sanchez, insisting that Sanchez had more money because he had just cashed a check inside the market. Sanchez claimed that he had no more money, and Zamora shot him in the neck. Sanchez was rushed to the hospital, where the bullet's laceration of his carotid artery

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

caused him to develop a hematoma that caused irreversible brain injury. Sanchez was in a coma for seven months before he died from complications from the gunshot wound.

On September 18, 2000, Kevin Freyre (Freyre) and Ruben Barraza (Barraza) were seated in Barraza's car outside their church in Long Beach when they were approached by Zamora and two other men. Zamora held a gun to Barraza's face and demanded money. Barraza complied. Zamora demanded that Barraza give him the stereo from the car. When Barraza was only able to remove the stereo's faceplate, Zamora hit him with the gun. Zamora's companion held a knife to Freyre's neck and demanded money. Freyre handed over his money, wallet, watch, and cellular telephone.

Zamora was charged by information with murdering and attempting to murder Sanchez during a robbery (§§ 187, subd. (a); 190.2, subd. (a)(17); 664) and with robbing Sanchez, Galaviz, Freyre, and Barraza (§ 211). In connection with the counts pertaining to victim Sanchez, firearm enhancements were alleged under section 12022.5, subdivision (a)(1) and 12022.53, subdivisions (b), (c), and (d). It was also alleged that a principal in the robbery of Galaviz was armed with a firearm (§ 12022, subd. (a)(1)). Zamora was alleged to have been armed with a firearm (§ 12022, subd. (a)(1)) and to have used a knife (§ 12022, subd. (b)(1)) while robbing Freyre and Barraza. The allegations of knife use and the allegation that a principal was armed during the Galaviz robbery were later dismissed at the prosecutor's request.

Prior to Zamora's jury trial, the trial court conducted a hearing on the admissibility of statements made by Sanchez at the hospital soon after he was shot. The trial court ruled that the statements were admissible as spontaneous declarations and possibly as dying declarations.

At trial, Galaviz testified that Zamora was the gunman in the July 2000 incident. Barraza identified Zamora as the gunman in the September 2000 robbery; a palm print recovered from Barraza's car also linked him to the crime. Zamora was convicted of first degree murder during the commission of a robbery and of the four robberies. The jury found all the special allegations relating to firearms to be true.

Although the trial court had the discretion to sentence Zamora to 25 years to life in state prison because Zamora was a minor at the time of the offense, the trial court sentenced Zamora to life imprisonment without the possibility of parole. The trial court imposed a consecutive sentence of 25 years to life for the firearms enhancement, section 12022.53, subdivision (d). The trial court imposed the mid term sentences of three years for the robberies of Galaviz, Freyre, and Barraza, all running concurrently with the other sentences; and stayed the imposition of sentence for the robbery of Sanchez pursuant to section 654. This appeal follows.

DISCUSSION

I. Sufficiency of the Evidence to Establish Proximate Causation

"If a person inflicts a dangerous wound on another, it is ordinarily no defense that inadequate medical treatment contributed to the victim's death. [Citations.] To be sure, when medical treatment is grossly improper, it may discharge liability for homicide if the maltreatment is the sole cause of death and hence an unforeseeable intervening cause. [Citations.]" (*People v. Roberts* (1992) 2 Cal.4th 271, 312 (*Roberts*); see also *People v. McGee* (1947) 31 Cal.2d 229, 240 (*McGee*).) Zamora argues that the evidence is insufficient to support his murder conviction because grossly improper medical treatment, not the gunshot wound, proximately caused Sanchez to die. "An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932.)

Sanchez was rushed to the emergency room after Zamora shot him. There, two imaging tests were performed to determine whether the bullet had damaged Sanchez's carotid artery. No damage was detected at the time, but approximately four hours later it

became apparent that the artery had ruptured. The forensic pathologist who performed the autopsy on Sanchez concluded that the bullet had lacerated Sanchez's external carotid artery, but that it caused a slow leak from the artery that was not "clinically evident" at the time; alternatively, the bullet might merely have weakened the artery so that it later ruptured.

The forensic pathologist testified that the bullet damaged Sanchez's carotid artery, and that the damage to that artery in turn caused a hematoma that blocked oxygen from reaching Sanchez's brain, resulting in irreversible brain injury so severe that Sanchez lost the ability to regulate his blood pressure, breathe, and urinate. The hematoma and brain injury were the result of the gunshot wound. Sanchez became comatose and remained in a coma for seven months until his death. Because of his brain damage, a catheter was inserted into his bladder to permit the evacuation of urine. Sanchez ultimately developed a bacterial infection at the site of the catheter and died. After performing the autopsy, the forensic pathologist concluded that the cause of Sanchez's death was complications from a gunshot wound to the neck.

On this record Zamora has not established that Sanchez received "grossly improper" medical treatment that was "the sole cause of death and hence an unforeseeable intervening cause." (*Roberts*, *supra*, 2 Cal.4th at p. 312.) Moreover, the evidence was sufficient for the jury to conclude that the gunshot wound was a cause of Sanchez's death and that it was not caused solely by the medical care Sanchez received. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1522-24 & fn. 9 [victim beaten into vegetative state developed pneumonia and died 46 days after the beating when antibiotics were withheld; decision to withhold antibiotics was neither an independent intervening cause of death nor the sole cause of death]; *McGee*, *supra*, 31 Cal.2d at p. 243 [even if prompt and proper care would have saved the victim's life, "defendant cannot complain because no force intervened to save him from the natural consequence of his criminal act. The factual situation is in legal effect the same, whether the victim of a wound bleeds to death because surgical attention is not available or because, although available, it is delayed by reason of the surgeon's gross neglect or incompetence. The delay in

treatment is not in fact an intervening force; it cannot in law amount to a supervening cause"].) Accordingly, the evidence was sufficient to permit the jury to conclude, as it did, that Zamora proximately caused Sanchez's death.

II. Admission of Sanchez's Statements

Before Sanchez slipped into a coma, he described the robbery and shooting to a police officer and provided a description of the assailants. The trial court admitted these statements as spontaneous statements (Evid. Code, § 1240) and observed that they were probably also admissible as dying declarations (Evid. Code, § 1242). Zamora argues that these statements were inadmissible and that his convictions for the murder and robbery of Sanchez and the robbery of Galaviz must be reversed. We conclude that the trial court properly admitted Sanchez's statements as spontaneous statements.

Evidence Code section 1240 establishes an exception to the hearsay rule for statements that "[p]urport[] to narrate, describe, or explain an act, condition, or event perceived by the declarant," and that were "made spontaneously while the declarant was under the stress of excitement caused by such perception." For a statement to be an admissible spontaneous statement, "'it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*).)

Focusing on Sanchez's coherence during the interview, Zamora argues that the trial court abused its discretion by admitting Sanchez's statements because Sanchez was capable of reflection and was no longer under the stress of excitement caused by the shooting. Whether the requirements of the spontaneous statement exception are satisfied is "largely a question of fact," and the determination of the matter is entrusted to the trial

court. (*Poggi*, *supra*, 45 Cal.3d at p. 318.) Deciding whether a statement qualifies as a spontaneous statement necessarily involves the trial court's exercise of discretion, and that discretion is most broad with respect to determining whether the utterance was made while under the stress of excitement and before the declarant had time to contrive and misrepresent. (*Id*. at pp. 318-319.) On appeal, the trial court's findings on this issue may not be disturbed unless the facts upon which it relied are not supported by a preponderance of the evidence. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.)

A preponderance of the evidence supports the trial court's ruling. Sanchez was interviewed by the police officer in a hospital emergency room approximately 15 minutes after he was shot and while he underwent emergency medical treatment. Suffering from a gunshot wound to the neck, Sanchez was in pain, bore what the officer believed to be a frightened, shocked, and surprised expression, and appeared to be suffering from shock. Blood was dripping down his throat, causing him to gurgle and to experience difficulty breathing and speaking. Sanchez asked for his wife and his children at least four times. He asked what would happen to him, causing the officer to attempt to calm him by telling him he would be fine and that his injury was superficial. Although he was sufficiently responsive and coherent to describe the events and his assailants, Sanchez also periodically became unresponsive and stared, wide-eyed, at the ceiling.

On this evidence, the trial court did not abuse its discretion in finding that Sanchez's statements were spontaneous. "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' [Citation.]" (*Poggi*, *supra*, 45 Cal.3d at p. 319.) Moreover, "the fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity." (*Ibid*.; see also *id*. at pp. 319-320 [murder victim's coherent statement in response to police questions, approximately 30 minutes after being stabbed, was a spontaneous statement]; *People v. Jones* (1984) 155 Cal.App.3d 653, 662 [upholding trial court's determination that murder victim's calm statement to police 30 to 40 minutes after being burned was

admissible under Evidence Code section 1240]; *People v. Francis* (1982) 129 Cal.App.3d 241, 253-254 [circumstances that less than 20 minutes had passed since victim was stabbed and that the victim was bleeding profusely suggested that victim was speaking "under circumstances of physical and emotional stress and shock, rather than reflection" such that statements were admissible spontaneous statements].) Because the statements were properly admitted under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240), we need not consider whether they were also admissible as dying declarations.

III. Enhancement under Section 12022.53, Subdivision (d)

Zamora argues that the imposition of a sentence enhancement for his personal and intentional discharge of a firearm, causing great bodily injury (§ 12022.53, subd. (d)) violates section 654, subdivision (a) and the merger doctrine because his murder sentence and the enhancement both punish him for the same act.

The merger doctrine provides that assault may not be the predicate felony for a felony-murder conviction, both because assault is an integral part of the homicide and because allowing assault to serve as the predicate offense would relieve the prosecution in most homicide cases of the need to prove malice. (*People v. Ireland* (1969) 70 Cal.2d 522, 539; *People v. Sanders* (Sept. 15, 2003, B150684) ____ Cal.App.4th ____ [2003 WL 22119886, *8-*9].) The doctrine does not apply to sentence enhancements and does not bar the imposition of an enhancement under section 12022.53, subdivision (d) when a defendant is convicted of first degree murder. (*Sanders*, ___ Cal.App.4th ___ [2003 WL 22119886, *8-*9].)

Zamora's argument that imposing a firearm enhancement on a murder conviction violates section 654, subdivision (a) has been rejected in four published decisions of the Court of Appeal. (*People v. Sanders*, *supra*, ___ Cal.App.4th ___ [2003 WL 22119886]; *People v. Hutchins* (2001) 90 Cal.App.4th 1308; *People v. Myers* (1997) 59 Cal.App.4th 1523; *People v. Ross* (1994) 28 Cal.App.4th 1151.) Assuming that section 654,

subdivision (a) applies to sentence enhancements—a matter unresolved by the California Supreme Court (*Ross*, at p. 1155)—the statute does not bar the imposition of a single firearms use enhancement to an offense committed by the use of firearms unless firearms use is an element of the offense when considered in the abstract. (*Hutchins*, at p. 1314; *Ross*, at p. 1156.) Because firearms use is not an element of murder—although this specific case did involve the use of a firearm—the trial court did not violate section 654, subdivision (a) by imposing the enhancement under section 12022.53, subdivision (d).

IV. Sentencing Discretion

Because Zamora was 17 years old when he committed first degree murder with special circumstances, he was ineligible for the death penalty. (§ 190.5, subd. (a).) For a minor convicted of first degree murder with special circumstances who was older than 16 years old but younger than 18 years old at the time of the offense, the presumptive sentence is life in prison without parole, but the trial court may depart from this presumptive sentence in favor of a sentence of 25 years to life. (§ 190.5, subd. (b); *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145.)

The prosecutor argued at sentencing that six aggravating factors warranted a sentence of life in prison without the possibility of parole—the degree of callousness and cruelty involved in the crime; the planned and sophisticated manner in which it was committed; its violence; the fact that Zamora committed multiple crimes on different dates; Zamora's prior criminal history; and Zamora's status as a probationer at the time he committed the crimes. The prosecutor identified only one possible mitigating circumstance—Zamora's age. Zamora's counsel agreed that "[t]he only thing that Mr. Zamora has going for himself . . . is his age" but urged the trial court to sentence Zamora to the lesser term.

The trial court sentenced Zamora to life imprisonment without the possibility of parole. The court explained, "Mr. Zamora, I've considered this carefully, especially in light of your age at the time of the offense. But I concluded that the Legislature has

already provided whatever benefits should be afforded that, by eliminating the possibility of the death penalty for this charge." Zamora argues that this comment reveals that the court refused to "giv[e] any fair consideration to the alternate punishment of a parole eligible life term," and requests a new sentencing hearing before a different judge.

The trial court's comments are not reasonably susceptible to Zamora's interpretation. We understand the trial court's statements to mean that it concluded, after consideration, that the sole arguably mitigating factor—Zamora's youth—did not merit the exercise of the court's discretion to impose the lighter alternative sentence. Contrary to Zamora's contention, these comments do not indicate that the court failed to consider imposing the alternate punishment—they reveal that when the court considered the lesser punishment, it discerned nothing about Zamora or his crimes that would justify leniency.

It is true that "'exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue,'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977, citation omitted), but Zamora has not demonstrated that the trial court departed from this standard. "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*Id*. at pp. 977-978.)

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.